United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL with proof of service

75-1040

To be argued by:
RICHARD S. SCANLAN

Docket No. 75-1040

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
- against -	:	INDICTMENT
	:	
CHARLES HODGES, DANIEL JORDANO, ANDREW JORDAN, a/k/a Andrew Jordano, and ANTHONY MUFFUCCI,	:	Index No. 74 Cr. 764
	:	
Defendants-Appellants.	:	

BRIEF FOR DEFENDANT-APPELLANT ANTHONY MUFFUCCI

RICHARD S. SCANLAN
ATTORNEY AT LAW
THE BAR BUILDING
199 MAIN STREET
WHITE PLAINS, N. Y. 10601

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA,

- against -

CHARLES HODGES, DANIEL JORDANO, ANDREW JORDAN, a/k/a Andrew Jordano, and ANTHONY MUFFUCCI,

Defendants-Appellants.

INDICTMENT

74 Cr. 764

----------X

BRIEF FOR DEFENDANT-APPELLANT ANTHONY MUFFUCCI

Preliminary Statement

This is an appeal pursuant to F.R.A.P. Rule 4(b), 28 U.S.C. from a judgment of the United States District Court for the Southern District of New York (CARTER J.; 1-28-75) convicting MR. MUFFUCCI after a jury trial of the three crimes of conspiracy to rob a federally insured bank (18 U.S.C. §371) robbery (18 U.S.C. §2113[a]), and grand larceny (18 U.S.C. §2113[b]), from the five year concurrent terms of imprisonment imposed for each of the counts, and from all prior intermediate orders. Said Defendant is presently at liberty on bail pending appeal.

FACTS

The indictment charges as follows: On September 20, 1973 the above named Defendants met in an apartment in Yonkers, New York and discussed the plans for the robbery whereby CHARLES HODGES and another would intercept two bank guards

and seize a money bag from them at a designated location according to prearranged plans. On September 21, 1973 the same above named Defendants met in a diner on Yonkers Avenue and waited for a telephone call notifying them that the bank guard had left the bank with the money. On the same day CHARLES HODGES took a bag containing approximately $36,500 from one of the bank guards and placed it in a 1973 blue Cadillac automobile.

At trial, CHARLES HODGES, a convicted felon (T, 59), testified for the Government as follows: He met MR. MUFFUCCI in the Spring of 1973. MR. MUFFUCCI was at that time the driver of a 1973 blue Cadillac. They had discussions about a robbery. He was taken to an alleyway on Yonkers Avenue and was told that he and his friend WILLIAMS were to intercept a bank guard and a messenger then "snatch" the money and escape through the alleyway and across a fence to an awaiting parked car (T,68). The Tuesday before the robbery he, WILLIAMS, a "motorcycle guy", and the remaining above named Defendants joined them and then drove down to Yonkers Avenue to survey the bank and the alleyway. He and WILLIAMS got out of the car and traversed the alleyway, went across the fence, down the driveway of an abutting premises, then waited for the others to pick them up after circling the block (T,73). On the Thursday night before the robbery, WILLIAMS, JORDAN, JORDANO, and himself spent the night at an undisclosed apartment and discussed the robbery (T,75-78). ANTHONY MUFFUCCI

was present in the apartment when he awoke the following morning (T,194). The following morning, he, WILLIAMS, JORDAN, and JORDANO went to the Yonkers Raceway diner where he and WILLIAMS entered, after which the motorcycle man entered, and they awaited the phone call (T,79-80). After receiving the telephone call, he and WILLIAMS proceeded to the alleyway and intercepted the messenger and the bank guard. He seized the bank bag and escaped down the alleyway and over a fence where he threw the money bag into ANTHONY MUFFUCCI's car driven by the motorcycle man. He fled in a white Vega driven by DANIEL JORDANO (T,83-84). DANIEL JORDANO drove him to Fordham Road in the Bronx (T,85). He did not get his share of the money (T,234).

On cross-examination, he testified as follows: There were to be cars stationed on the day of the robbery such as to block off the police, but on the day of the robbery he did not notice any such cars (T,239-240). He had a fleeting acquaintance with the motorcycle man, meeting him three times in his life (the Thursday evening before the robbery and the morning of the robbery - thus twice) and yet the plans required him to toss the money into a car driven by this unknown individual then take a ride in a separate car driven by DANIEL JORDANO (T,235). The Thursday evening before the robbery a woman was present in the apartment, however, the Court below would not permit counsel to inquire of the witness whether he gave the description of the woman to the FBI (T,241).

At trial, the Court accepted into evidence over objection of Defense the Government's Exhibit "1" which purported to be a fair and accurate representation of the bank, buildings and alleyway along Yonkers Avenue (T,38-41). The alleyway and fence are schmatically denoted but not depicted in any graphic or self-explanatory manner. The person through whom the Government admitted it into evidence did not draw it, he had never traversed the alleyway, and he could not describe it or the fence over which MR. HODGES allegedly climbed. The map indicates private homes and the abutting driveway in the area where MR. HODGES, MR. JORDANO and the motorcycle man allegedly escaped in the get-away cars (T,38-41).

MR. HODGES, the witness to whom the Government made promises in exchange for his testimony at trial (T,86), was the only person to describe the alleyway. When MR. WILLIAMS testified for the Defense, he could not describe whether the fence was sitting on a wall not not (T,499). MR. WILLIAMS is a convicted felon for the crimes of burglary and attempted murder (T,546-547).

Over the objection of Defense Counsel (T,135-136), the Government was permitted to call a one Nancy Willis as a hostile witness whose testimony it planned to and did in fact attempt to impeach through use of her prior statements to the FBI and her prior testimony before the Grand Jury. She testified that during the Summer of 1973 she did not overhear any

conversations between DANIEL JORDANO and ANDREW JORDON in which the subject of a bank manager of the transfer of funds was discussed (T,296-297). The Government was permitted to confront her with her Grand Jury testimony to the contrary despite the fact that her previous testimony on the first trial of this case in November 1974 was consistent with her testimony at this trial (T,299). She denied at trial ever overhearing a similar conversation between ANTHONY MUFFUCCI and DANIEL JORDANO in September 1973, which testimony was consistant with her testimony at the previous trial of this case in November 1974. Yet, the Government was permitted to confront her with apparent statements to the contrary which she made to special agents of the FBI (T,299-302).

By way of affirmative defense, and as and for an alibi, a one WILLIAM HEROLD, who was a former Albany business partner and friend of MR. MUFFUCCI, testified on his behalf that the Friday evening prior to the robbery MR. MUFFUCCI was in Albany requesting a loan from MR. HAROLD. MR. MUFFUCCI spent the night at MR. HAROLD's garage then left for Yonkers the following morning. MR. MUFFUCCI's wife, Geraldine, testified and corrobated that on Thursday, September 20, 1973, MR. MUFFUCCI was absent from the house after informing her that he was venturing to Albany in an effort to borrow money from his friend MR. HAROLD (T,784-792, 812-820).

For the Government, Mr. Troiano, the branch manager of the Yonkers Savings Bank testified as follows: The Yonkers

Savings Bank maintained a checking account with the neighboring National Bank of North America (T,42). Two or three times a week (T,42) his uniformed and armed bank guard (Michael Novotny) would provide security for a bank officer who would carry an inscribed money bag (T,54-56) back to the Yonkers Savings Bank after making the withdrawal of operating money from the National Bank of North America (T,43-44).

It is argued by the Defense that this was a street crime exclusively planned and executed by HODGES and WILLIAMS, and was not the result of the complex and detailed planning alleged by the Government (T,842-845).

The Government argued that the post-arrest accessability of HODGES and WILLIAMS was so limited, even with the help of WILLIAMS's girlfriend CHRISTINE DIAL, so as to make it unlikely that they fabricated their story (T,926,933). However, the Government never credited HODGES and WILLIAMS with the intelligence of putting the finishing touches on their pre-arrest plans to frame MR. MUFFUCCI in the event either was caught. Indeed, the testimony of Nancy Willis in no way corroborated the alleged meetings and plans about which HODGES and WILLIAMS testified.

QUESTIONS PRESENTED

1. Was the trial court in error in denying the pre-trial and trial motions to dismiss?

2. Was it a denial of a substantial right and a denial of due process for the trial court to refuse to voir dire the veniremen as to whether any felt that MR. MUFFUCCI had to take the witness stand?

3. Was it an abuse of discretion and a denial of due process for the trial court to admit into evidence Government's Exhibit "1" - a diagram ostensibly depicting how the conspiracy and crime were to be carried out?

4. Was it a denial of due process and of confrontation for the trial court to permit the Government to call Nancy Willis to testify for the sole purpose of impeaching her testimony and using her as a vehicle by which to place before the jury her ex parte statements to the F.B.I. and her Grand Jury testimony?

ANALYSIS OF INDICTMENT

A). Count One:

The first count of the indictment charges ANTHONY MUFFUCCI and others with "***did unlawfully, willfully and knowingly combine, conspire, confederate and agree to commit a crime against the United States of America...*(¶"1").

The first count of the indictment further states

that "it was part of said conspiracy that the defendants unlawfully, willfully and knowingly, by force, violence and intimidation, would take and cause to be taken from the person and presence of another, sums of money belonging to and in the care, custody, control, management and possession of the Yonkers Savings Bank..."(¶"2").

The indictment further states that: "among the means whereby the defendants would and did carry out said conspiracy were the following:

> "a) Ronald Corbia would according to prearranged plan with the defendants, carry a sum of money from the National Bank of North America, along Yonkers Avenue in Yonkers, New York, toward his place of employment, the Yonkers Savings Bank.
> b) At a designated location along the route CHARLES HODGES, the defendant and another person known to the Grand Jury, would intercept Corbia, forcibly subdue any accompanying bank guards, and seize the money'; Corbia would pretend to be a victim of the robbery.
> c) The defendant CHARLES HODGES would thereafter deliver said proceeds to the defendant DANIEL JORDANO, who would, in turn, divide the proceeds among the other defendants"(¶"3").

The indictment alleges as and for the Overt Acts the following:

> "1. On or about September 20, 1973, the defendants CHARLES HODGES, DANIEL JORDANO, ANDREW JORDAN, a/k/a Andrew Jordano, and ANTHONY MUFFUCCI had a meeting in an apartment in Yonkers, New York, at which time they discussed the robbery plans.
> 2. On or about September 21, 1973, the defendants CHARLES HODGES, DANIEL JORDANO, ANDREW JORDAN a/k/a/ Andrew Jordan and ANTHY MUFFUCCI went to a diner on Yonkers Avenue in Yonkers, New York, and waited for

a telephone call notifying them that Corbia had left the bank with the money.

3. On or about September 21, 1973, at Yonkers Avenue, Yonkers, New York, the defendant CHARLES HODGES took a bag containing approximately $36,500 from Ronald Corbia.

4. On or about September 21, 1973, the defendant CHARLES HODGES placed the bag containing approximately $36,500 which he took from Ronald Corbia in a 1973 blue Cadillac automobile with a white top.

5. On or about September 21, 1973, the defendants CHARLES HODGES and DANIEL JORDANO drove in a white Vega automobile to Fordham Road in the Bronx, New York, to give the defendant CHARLES HODGES his share of the money"(¶ Overt Acts).

B). Count Two:

The second count of the indictment charges ANTHONY MUFFUCCI and the others with having "***unlawfully, willfully and knowingly did, by force, violence and intimidation take from the person and presence of another, approximately $36,500 belonging to and in the care..."

C). Count Three:

The third count of the indictment charges MR. MUFFUCCI and the other "on or about the 21st day of September, 1973 ***unlawfully, willfully and knowingly, and with intent to steal and purloin, did take and carry away approximately $36,500 belong to and in the care..."

PRE-TRIAL MOTIONS

By notice of motion and affidavit dated October 11, 1974, counsel for the defendant moved the court below to dismiss Count "2" of the indictment as well as paragraphs "2" and

"4" of Count "1" of the indictment herein. The affidavit supporting said motion states as follows:

> "Given the irrefutable fact that the Government alleges in its own indictment that Corbia, the individual who allegedly carried the money and from whom it was 'taken' at the time of the alleged robbery, was in effect, a willing participant who 'merely pretended to be a victim of the robbery' and voluntarily relinquished the bag, it is submitted that the $36,500 which constitutes the corpus of the crime was not obtained through 'force and violence, or by intimidation' of Corbia and therefore, is not a crime within the purview of section 2113 (a) of Title 18 U.S.C."

TRIAL MOTIONS

At the end of the Government's case, counsel for the defendant moved to dismiss the indictment pursuant to Fed. Rules of Crim. Proc. Rule 29(a), and renewed the motion at the end of the defendants' case (T,457, 828).

ARGUMENT

POINT I
THE MOTIONS TO DISMISS SHOULD HAVE BEEN GRANTED

A). Motion to dismiss ¶"2" of Count One of the Indictment:

Clearly, the motion should have been granted because the indictment is inconsistent on its face. The indictment charges that Corbia pursuant to a prearranged plan, would willingly let the money bag go. Moreover, at trial there was no evidence that force, violence or intimidation was used to obtain the money bag from Corbia. In fact, Corbia was acquitted of his participation in such a prearranged plan and executed crime on the first trial of this case in November 1974.

B). Motion to dismiss ¶"3" of Count One of the Indictment:

There was no evidence of any prearranged plan which Ronald Corbia had with the defendants or vice versa. Nor was there any evidence that Corbia pretended to be the victim of the robbery. Corbia was acquitted of his alleged participation in the robbery on the first trial of this case in November 1974. Finally, there was no evidence that the proceeds were turned over to DANIEL JORDANO and divided among the other defendants.

C). Motion to dismiss Count One on the grounds of failure of proof with respect to the Overt Acts:

With respect to the first Overt Act, there was no

evidence that ANTHONY MUFFUCCI had a meeting in an apartment in Yonkers on September 20, 1973.

With respect to the second Overt Act, there was no evidence that ANTHONY MUFFUCCI went to the diner on Yonkers Avenue on September 21, 1973.

With respect to the fifth Overt Act, there was no evidence that CHARLES HODGES and DANIEL JORDANO drove to Fordham Road "***to give the defendant CHARLES HODGES his share of the money."

The only evidence adduced at trial which might possibly be construed against MR. MUFFUCCI, with respect to the Overt Acts, was that CHARLES HODGES took a bag containing $36,500 from Ronald Corbia and allegedly placed it in a 1973 blue Cadillac automobile.

D). Motion to dismiss Count Two:

There was no evidence that the money was taken by force, violence or intimidation. Even if the evidence was viewed to have proven MR. MUFFUCCI with having attempted to commit an earlier offense of the same nature, it could not be inferred that an intent to aid is carried to a later offense which did come to fruition as a foreseeable consequence of the earlier attempt. U.S.A. v. Greer, 467 F.2d 1064(7th Cir., 1972), cert. den. 410 U.S. 929.

E). Motion to dismiss Count Three of the Indictment:

It follows that if the conspiracy count falls, so must this, and the converse is true as MR. MUFFUCCI would be convicted as an accomplice - aiding and abetting.

POINT II

THE DEFENDANT WAS DENIED A SUBSTANTIAL RIGHT WHEN THE TRIAL JUDGE REFUSED TO VOIR DIRE THE JURY WITH RESPECT TO THEIR ATTITUDE TOWARDS A DEFENDANT'S FAILURE TO TAKE THE WITNESS STAND

The defense counsel requested the trial judge to ask the veniremen whether any of them believe that MR. MUFFUCCI has a duty to take the witness stand to explain anything. The trial judge refused. MR. MUFFUCCI did not take the witness stand.

A trial court's broad discretion as to the questions to be asked on voir dire is subject to the essential demands of fairness. Sellers v. United States, 271 F.2d 475,at 476-477,(CT.AP.D.C. 1959). The procedure for voir diring the panel cannot be "perfunctory". U.S.A. v. Dellinger, et al, 472 F.2d 340,at 366, (7th Cir.,1972). Here, the procedure was just that - perfunctory.

The trial attorney should be permitted to inquire through the court into subject matter even though it is not an issue before the court. The questions need not relate directly to the indictment or the pleas in the case. "Some questions may appear tangential to the trial but are actually so integral to the citizen juror's view of the case ***that they must be explored." Id., at p.368. Even if the attorney's form of the question is improper, the duty is raised upon the trial judge to properly phrase the question to get at the root of the matter. This duty is neither met by a "perfunctory"

voir dire (Id., at p. 366), nor by general questions (United States v. Lewin, 347 F.2d 1132 at 1137[7th Cir. 1972]). It is "*** the court's obligation to let counsel, on request, get at the underlying bases reflecting on bias, prejudice or other suspect factors." United States v. Lewin, supra, at 1138.

It follows that if the veniremen can be questioned with respect to their attitude to certain defenses (People v. Carpenter, 102 N.Y. 238[1886]; People v. Moore, 6 Ill. App.3d 568, 286 N.E.2d6[Ap.Ct., 3rd Dist. Ill.1972]; State v. Olson, 480 P.2d 822[Sup.Ct., Montana 1971]; United States v. Russell, 459 F.2d 671[9th Cir. 1972], cert. granted 409 U.S.911, they can be questioned where there is no defense or an alibi defense.

POINT III
IT WAS AN IMPROVIDENT EXERCISE OF DISCRETION FOR THE TRIAL JUDGE TO ADMIT AS INDEPENDENT EVIDENCE A DIAGRAM OF THE SCENE OF THE CRIME TO PROVE THE GOVERNMENT'S THEORY OF THE WAY THE CONSPIRACY WAS CARRIED OUT. THERE WAS NO FOUNDATION FOR IT. ITS PREJUDICIAL AFFECT FAR OUTWEIGHED ITS PROBATIVE VALUE

The Government postulated a highly suspect theory of the manner in which the alleged conspiracy was carried out, viz: HODGES jumping over a fence which was mounted on a wall above grade and escaping in a Vega automobile after placing the money in an automobile driven by an unidentified person.

The diagram, Governments Exhibit "1", which was introduced to prove this theory, was admitted without authentification and without supporting evidence in the record. Mr.

Troiano did not prepare it, nor did he authenticate it.

It was not a "clear-cut illustration" accurately and fairly reflecting evidence in the record. United States v. Park Avenue Pharmacy, 56 F.2d 753 (2nd Cir.,1932); Gordon v. U.S.A., 438 F.2d 858 (5th Cir.,1971); Carroll v. U.S.A., 326 F.2d 72 (9th Cir.,1963); U.S.A. v. Moody, 339 F.2d 161 (6th Cir.,1964).

POINT IV

THE GOVERNMENT WELL KNEW IN ADVANCE OF TRIAL WHAT THE TESTIMONY OF NANCY WILLIS WOULD BE. NEVERTHELESS, THE TRIAL JUDGE PERMITTED THE GOVERNMENT TO CALL THIS WITNESS TO THE STAND FOR THE SOLE PURPOSE OF IMPEACHING HER AND PLACING BEFORE THE JURY HER EX PARTE STATEMENTS GIVEN TO THE F.B.I. AND GIVEN TO THE GRAND JURY.

A witness may not be called to the stand in order that he might be impeached. Fontaine v. Patterson, 305 F.2d 124 (5th Cir.,1962).

The sine qua non for the Government to impeach a witness or have declared a witness as hostile is the element of surprise. Brown v. U.S.A., 411 F.2d 716(D.C.Cir.,1969); California v. Green, 399 US 149(1970). Moreover, the Government may not avoid its own witnesses before trial so as to assert a legitimate claim of surprise at trial. Brown, supra.

In the California v. Green case, the Government's chief witness who testified at trial was evasive and uncooperative. At the preliminary hearing he testified at length incriminating the defendant there. The trial court permitted

the prosecutor to read excerpts from the witness's preliminary hearing testimony. At that preliminary hearing the defendants same counsel was present and subjected the chief witness to extensive cross-examination. But in the case at Bar, none of the attorneys for the defendants were present either during the F.B.I. interviews or at the Grand Jury.

The Government knew at least one month prior to trial that Nancy Willis, if called, would testify at variance to her testimony before the Grand Jury and contrary to her statements given to the F.B.I.. It has been held that as little notice as 16 days prior to trial is not sufficient to constitute "surprise". Hooks v. U.S.A., 375 F.2d 2112 (5th Cir., 196.).

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED

Dated: White Plains, New York
March 26, 1975

Respectfully submitted,

RICHARD S. SCANLAN,
Attorney for Anthony Muffucci
199 Main Street
White Plains, New York 10601
Tel. (914) 949-2560

AFFIRMATION OF SERVICE

STATE OF NEW YORK)
:ss.:
COUNTY OF WESTCHESTER)

RICHARD S. SCANLAN, respectfully states as follows:

1. I am an attorney at law duly admitted to practice before the Bar of the State of New York and before the Federal District Court for the Southern District of New York.

2. On March 26, 1975 I served a copy of the appendix and a copy of Appellant ANTHONY MUFFUCCI's brief upon

a) ROBERT B. HEMLEY, Assistant United States Attorney, attorney for the Appellee herein, by personally delivering the same to his receptionist at the United States Courthouse - Foley Square, New York, New York

b) JAMES LA ROSA, ESQ., attorney for DANIEL JORDANO, by personally delivering the same to his receptionist at 522 Fifth Avenue, New York, New York, and

c) BENJAMIN J. GOLUB, ESQ., attorney for ANDREW JORDAN, by personally delivering the same to his receptionist at 10 East 40th Street, New York, New York.

3. This affirmation is made under the penalties of perjury and pursuant to C.P.L.R. Rule 2106.

Dated: White Plains, New York
March 26, 1975

RICHARD S. SCANLAN